A

Tan Wee Ching v Da Tong Shi Je Supplies & Services Sdn Bhd and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(A)-674–11 OF 2019 AND A-01(A)-688–11 OF 2019
HANIPAH FARIKULLAH, LEE SWEE SENG AND AZIZAH NAWAWI JJCA
20 APRIL 2022

C

Labour Law — Industrial Court — Reference by Minister — Whether Minister's reference of claimant's complaint of wrongful dismissal to Industrial Court for adjudication under s 20(3) of Industrial Relations Act 1967 ('IRA') was
D *properly made — Whether main issue for court's determination was whether claimant was a workman under the IRA — Whether High Court wrongly quashed Minister's reference after erroneously finding that Minister had himself decided that claimant was a workman — Whether Minister's reference was not nullified by fact that he could not produce a formal reference of the matter to him by*
E *the Director-General of Industrial Relations under s 20(2) IRA — Whether the s 20(2) reference was merely administrative in nature*

The two appeals herein emanated from a decision of the High Court to quash the decision of the Human Resources Minister ('the Minister') under the
F pre-amended s 20(3) of the Industrial Relations Act 1967 ('IRA') to refer to the Industrial Court ('IC') for adjudication a claim by one Tan Wee Ching ('Tan') that he was wrongfully dismissed from employment. Via a resolution passed at an extra-ordinary general meeting, Tan was removed as a director of Da Tong Shi Je Supplies & Services Sdn Bhd ('the company'). He lodged a
G representation with the Industrial Relations Department contending that he was dismissed without just cause or excuse and sought reinstatement to his former employment. When the Department's attempt to achieve a settlement between the parties failed, the Director-General of Industrial Relations, pursuant to the then s 20(2) of the IRA, informed the Minister accordingly.
H After considering Tan's representation, the Minister referred the matter to the IC for adjudication. By way of a judicial review application, the company sought to quash the Minister's reference and prevent him from referring the dispute to the IC. The company contended that Tan was not an employee but a director and the brain and directing mind of the company. Tan, on the other
I hand, said that he was employed as a salaried director and showed evidence of the company's contributions to his EPF and SOCSO accounts. The judicial commissioner ('JC') decided in favour of the company after ruling that the Minister erred in deciding that Tan was a workman within the ambit of the IRA. Both Tan and the Minister appealed against the JC's decision.

Held, unanimously allowing the appeals and setting aside the JC's decision:

(1) The JC erred in quashing the Minister's reference to the IC. The Minister had duly exercised his discretion within the ambit of s 20(3) of the IRA. The only question the Minister had to consider was whether Tan's representation raised a serious issue of fact and/or law which required adjudication by the IC; the main legal issue being whether or not Tan was a workman under the IRA. The Minister had duly considered all the facts placed before him in concluding that the dispute had to be referred to the IC for adjudication (see paras 56–57 & 30).

(2) The JC erred in holding that the Minister had wrongly decided that Tan was a workman under the IRA. If the JC took the view that it was for the IC to decide whether or not Tan was a workman, then the JC should not have quashed the Minister's reference. The very fact that the Minister referred the matter to the IC was for the IC to decide, inter alia, whether or not Tan was a workman. The reference did not mean the Minister had himself already decided that Tan was a workman under the IRA. The question that the JC should have decided, but failed to decide, was whether or not the Minister's reference to the IC was an error of law (see paras 38–43 & 46)

(3) The Minister's affidavit did not show that he had decided that Tan was a workman. The affidavit merely revealed the source of information and what sort of information he had relied upon to decide whether or not to refer Tan's representation to the IC. The JC failed to consider para 20 of the Minister's affidavit, where the Minister unequivocally stated that since there were disputed issues of law, Tan's representation had to be referred to the IC for adjudication. The Minister did not make any finding that Tan was a workman within the ambit of the IRA (see paras 44–45).

(4) The JC made a finding that the Minister was statutorily required to show the formal reference made to him by the Director-General of Industrial Relations under s 20(2) of the IRA and that the Minister's failure in this regard was fatal. Both Tan and the Minister took the position that this was not a pleaded issue raised in the judicial review application. The JC erred in law when he decided on an unpleaded issue. Order 53 r 3(2) of the Rules of Court 2012 provided that the grounds of the application must be stated in the statement and the statement may be amended to include new grounds under O 53 r 7. Added to that, the JC only raised the issue on the day he delivered his decision on the judicial review application without affording the parties an opportunity to submit on the matter. This court was of the view that the notification under s 20(2) of the IRA was merely administrative in nature and the Minister's failure to exhibit the same did not nullify his reference to the IC under s 20(3) (see paras 47–49 & 53–55).

[Bahasa Malaysia summary

Kedua-dua rayuan ini adalah dari keputusan Mahkamah Tinggi yang mengetepikan keputusan Menteri Sumber Manusia ('Menteri') di bawah pindaan 20(3) Akta Perhubungan Perusahaan 1967 ('APP') untuk rujukan kepada Mahkamah Perusahaan ('MP') untuk mendengar tuntutan Tan Wee Ching ('Tan') yang telah dipecat secara salah sebagai pekerja. Melalui resolusi yang diluluskan ketika mesyuarat agung luar biasa, Tan telah dipecat sebagai pengarah Da Tong Shi Je Supplies & Services Sdn Bhd ('syarikat'). Dia mengemukakan representasi kepada Jabatan Perhubungan Perusahaan yang berpendapat bahawa dia dipecat tanpa sebab atau alasan yang adil dan meminta perlantikan semula jawatannya. Apabila percubaan Jabatan untuk mencapai penyelesaian antara pihak-pihak gagal, Ketua Pengarah Perhubungan Perusahaan, menurut s 20(2) IRA ketika itu, memaklumkan Menteri dengan sewajarnya. Selepas mempertimbangkan representasi Tan, Menteri merujuk perkara tersebut kepada MP. Melalui permohonan semakan kehakiman, syarikat tersebut berusaha untuk membatalkan rujukan Menteri dan menghalangnya daripada merujuk tuntutan tersebut kepada MP. Syarikat tersebut menghujahkan bahawa Tan bukanlah pekerja tetapi pengarah yang menentukan halatuju syarikat. Tan, sebaliknya, menghujahkan bahawa jawatannya sebagai pengarah adalah bergaji dan menunjukkan keterangan caruman syarikat tersebut ke akaun KWSP dan PERKESO. pesuruhjaya kehakiman ('PK') memutuskan untuk memihak kepada syarikat tersebut setelah memutuskan bahawa Menteri adalah salah dalam memutuskan bahawa Tan adalah pekerja dalam peruntukan APP. Tan dan Menteri merayu terhadap keputusan PK tersebut.

Diputuskan, sebulat suara membenarkan rayuan-rayuan dan menolak keputusan PK:

(1) PK telah terkhilaf kerana membatalkan rujukan Menteri kepada MP. Menteri telah menggunakan budi bicaranya dengan sewajarnya seperti yang diperuntukkan oleh s 20(3) APP. Satu-satunya soalan yang perlu dipertimbangkan oleh Menteri ialah sama ada representasi Tan menimbulkan isu fakta dan/atau undang-undang yang serius yang memerlukan penghakiman oleh MP; isu undang-undang utama ialah sama ada Tan adalah pekerja di bawah APP atau tidak. Menteri telah mempertimbangkan semua fakta di hadapannya ketika menyimpulkan bahawa tuntutan tersebut harus dirujuk kepada MP untuk didengar (lihat perenggan 56–57 & 30).

(2) PK telah terkhilaf ketika menyatakan bahawa Menteri telah salah ketika memutuskan bahawa Tan adalah seorang pekerja di bawah APP. Jika PK berpandangan bahawa MP berhak memutuskan sama ada Tan adalah seorang pekerja atau tidak, maka PK tidak sepatutnya membatalkan rujukan Menteri tersebut. Fakta bahawa Menteri merujuk perkara

tersebut kepada MP adalah untuk MP memutuskan, antara lain, sama ada Tan adalah seorang pekerja atau tidak. Rujukan tersebut tidak bermakna Menteri sendiri telah memutuskan bahawa Tan adalah seorang pekerja di bawah APP. Persoalan yang sepatutnya diputuskan oleh PK, yang mana ianya gagal diputuskan, adalah sama ada rujukan Menteri kepada MP adalah kesilapan undang-undang (lihat perenggan 38–43 & 46).

(3) Afidavit oleh Menteri tidak menunjukkan bahawa beliau telah memutuskan bahawa Tan adalah seorang pekerja. Afidavit tersebut hanya mendedahkan sumber maklumat yang diteliti untuk memutuskan sama ada untuk merujuk representasi Tan kepada MP. PK gagal mempertimbangkan perenggan 20 afidavit Menteri, di mana Menteri dengan tegas menyatakan bahawa oleh kerana terdapat isu-isu undang-undang yang dipertikaikan, representasi Tan harus dirujuk kepada MP untuk didengar. Menteri tidak membuat sebarang penemuan bahawa Tan adalah seorang pekerja menurut peruntukan APP (lihat perenggan 44–45)

(4) PK memutuskan bahawa Menteri dikehendaki menunjukkan rujukan rasmi oleh Ketua Pengarah Perhubungan Perindustrian seperti yang diperuntukkan di s 20(2) APP dan kegagalan Menteri dalam hal ini adalah tidak boleh diperbaiki. Tan dan Menteri menghujahkan bahawa ini bukan isu rayuan yang dibangkitkan dalam permohonan semakan kehakiman. PK terkhilaf dalam undang-undang apabila dia memutuskan isu yang tidak dirayu. Aturan 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 memperuntukkan bahawa alasan permohonan tersebut mesti dinyatakan dalam pernyataan dan Pernyataan tersebut boleh dipinda untuk memasukkan alasan baru di bawah A 53 k 7. Selain itu, PK hanya membangkitkan isu tersebut pada hari beliau menyampaikan keputusannya mengenai permohonan semakan kehakiman tanpa memberi peluang kepada pihak-pihak untuk menghujahkan perkara tersebut. Mahkamah ini berpendapat bahawa notifikasi di bawah s 20(2) APP hanya bersifat pentadbiran dan kegagalan Menteri untuk memasukkan perkara tersebut tidak membatalkan rujukannya kepada MP di bawah s 20(3) (lihat perenggan 47–49 & 53–55).]

Cases referred to

Assunta Hospital v Dr A Dutt [1981] 1 MLJ 115; [1980] 1 LNS 121, FC (refd)
CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor [2018] 3 MLJ 689, FC (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)
Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)

A *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & other appeals [1996] 1
B MLJ 481; [1997] 1 CLJ 665, CA (refd)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297, SC (refd)
Menteri Sumber Manusia v John Hancock Life Insurance (M) Bhd [2007] 2 MLJ 546; [2007] 1 CLJ 366, CA (refd)
C *Minister of Labour and Manpower & Anor v Wix Corporation South East Asia Sdn Bhd* [1980] 2 MLJ 248; [1980] 1 MLRA 515, FC (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (refd)
D *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612; [2021] 7 CLJ 371, CA (refd)
E *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

Legislation referred to

Companies Act 2016 s 206
F Industrial Relations Act 1967 s 20(1), (2), (3)
Rules of Court 2012 O 53 rr 3(2), 7

Appeal from: *Da Tong Shi Je Supplies & Services Sdn Bhd lwn Menteri Sumber Manusia Malaysia dan satu lagi* [2020] MLJU 68 (High Court, Ipoh)

G *Andrew Soong Tze Toong (with Chong Xin Tong) (BH Koh, Soong, Zarin & Partners) in Civil Appeal No A-01(A)-674–11 of 2019 for the appellant.*
Ashyraf Ashy'ari bin Kamaruzzaman (Senior Federal Counsel, Perak State Legal Advisor's Office) in Civil Appeal No A-01(A)-688–11 of 2019 for the appellant.
Rabinder Singh (Rabin & Assoc) in Civil Appeal Nos A-01(A)-674–11 of 2019
H *and A-01(A)-688–11 of 2019 for the respondent.*

Azizah Nawawi JCA:

INTRODUCTION

I

[1] There are two appeals before this court:

(a) A-01(A)-674–11 of 2019; and

(b) A-01(A)-688–11 of 2019.

[2] Both appeals emanate from the decision of the learned judicial commissioner dated 4 November 2019 in quashing the decision of the Minister of Industrial Relations ('Minister') under sub-s 20(3) of the Industrial Relations Act 1967 ('the IRA 1967') to refer the appellant's (Tan Wee Ching) representation on unlawful dismissal to the Industrial Court for adjudication.

[3] Both appeals relate to the exercise of the discretion of the Minister under sub-s 20(3) of the IRA 1967, which has since been amended by the Industrial Relations (Amendment) Act 2020 (Act A1615) which comes into force on 1 January 2021, and the amended sub-s 20(3) reads as follows:

> (3) Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the Director General shall refer the representations to the Court for an award.

[4] Having considered the appeal records and the submissions of the parties, we find merit in both appeals and consequently we allow the appeal and set aside the decision of the learned judicial commissioner.

THE SALIENT FACTS

[5] The respondent/company is a company incorporated in Malaysia, carrying out columbarium business at PT 19049, Off Jalan Raja Dr Nazrin Shah, 31350 Ipoh, Perak Darul Ridzuan.

[6] The appellant, Tan Wee Ching ('claimant') was appointed a director of the respondent in 2012.

[7] On 29 June 2018, a members' meeting was held and the claimant was removed as a director of the respondent/company via a resolution.

[8] On 16 August 2018, the claimant made a representation to the Director General of Industrial Relations under sub-s 20(1) of the IRA 1967, seeking a reinstatement. Pursuant to sub-s 20(2), a conciliation meeting was held at the Perak Industrial Relation Office in Ipoh on 30 August 2018. The said conciliation meeting was attended by the claimant and representatives of the respondent. However, the parties did not arrive at any settlement.

[9] Thereafter, the claimant's representation was referred to the Director General of Industrial Relations Department at Putra Jaya. Consequently, vide a letter dated 30 October 2018, the Minister decided to refer the claimant's representation to the Industrial Court under sub-s 20(3) of the IRA 1967 for adjudication.

[10] The respondent then filed a judicial review application on 10 January 2019 seeking an order of certiorari to quash the decision of the Minister to refer the claimant's representation to the Industrial Court and an order of mandamus to prevent the Minister from referring the same to the Industrial Court.

[11] Having considered the substantive application, the learned judicial commissioner allowed the respondent's application and granted the following orders on 4 November 2019:

(a) suatu perintah certiorari dikeluarkan untuk membatalkan keputusan responden pertama (kini perayu) yang dibuat pada 30 Oktober 2018 yang merujuk representasi mengenai pembuangan kerja responden kedua ke Mahkamah Perusahaan; dan

(b) suatu perintah mandamus dikeluarkan yang mengkehendaki responden pertama tidak merujuk representasi mengenai pembuangan kerja responden kedua ke Mahkamah Perusahaan.

[12] Both the Minister and the claimant have respectively filed their appeals against the decision of the learned judicial commissioner.

THE DECISION OF THE HIGH COURT

[13] The learned judicial commissioner made a finding that the Minister has erred in law when he decided that the claimant was a workman within the ambit of the IRA 1967. Consequently, he quashed the Minister's reference to the Industrial Court and made an order of mandamus to restrain the Minister from referring the claimant's complaint of unlawful dismissal being litigated in the Industrial Court.

OUR DECISION

[14] The central feature of appellate intervention is trite, that is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie *to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence*. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge

who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie *that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal*. This is consistent with the established plainly wrong test. (Emphasis added.)

[15] In another case, the Federal Court in *CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor* [2018] 3 MLJ 689 held as follows:

[38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence* (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (Emphasis added.)

[16] Bearing in mind the above cases, we will now deal with the issues raised by the parties.

Review of the Minister's decision

[17] In the present appeal, the respondent was challenging the legality of the Minister's decision to refer the claimant's representation to the Industrial Court under sub-s 20(3) of the IRA 1967. When the Minister's reference is being challenged in court, the said decision may be reviewed by the court based on the grounds of illegality, irrationality, procedural impropriety and proportionality.

[18] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, the Federal Court has set out the function of the court in an application for judicial review and the correct test to be applied is as follows:

[15] ... Historically, *judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety*. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter*. Thus, the distinction between review and appeal no longer holds. (Emphasis added.)

[19] In the statement dated 10 January 2019, filed pursuant to O 53 r 3(2) of the ROC 2012, the respondent relied on the grounds of illegality and irrationality to review the Minister's decision. The learned judicial commissioner however, has only dealt with the issue of illegality and made a finding that the Minister has exceeded his jurisdiction when he referred the claimant's reference to the Industrial Court. Therefore, in order to ascertain if the Minister's decision is tainted with illegality, we must first look at the well-established test in the application of sub-s 20(3) of the IRA 1967.

The test in sub-s 20(3) of the IRA 1967

[20] The decision of the Minister, which is now being challenged is made pursuant to sub-s 20(3) of the IRA 1967. Section 20 reads:

> 20 Representations on dismissals
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> (1) Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
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> (1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
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> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
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> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[21] Subsection 20(3) of the IRA 1967 provides the Minister the discretion to determine whether a particular representation is to be referred to the Industrial Court for adjudication.

[22] Even though the Minister's decision pursuant to sub-s 20(3) of the IRA 1967 involves ministerial discretion, it is trite law that the Minister's decision is subject to review by the courts. The court's role in reviewing the Minister's decision is to examine, whether, on the facts and circumstances before the Minister, the representation gives rise to a serious issue of fact or law which necessitates reference to the Industrial Court. One of the earlier cases on this is the decision of *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115; [1980] 1 LNS 121, where the Federal Court dismissed the employer's application for a

prohibition to prevent the Industrial Court from adjudicating the matter on the ground that Dr Dutt was not a workman. The Federal Court observed at p 116 (MLJ) as follows: A

> *The question whether Dr Dutt was a workman* within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, *is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse*. (Emphasis added.) B

[23] In *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9, the Supreme Court held that: C

> The Minister has a discretion under s 20 (3) of the Industrial Relations Act 1967 and so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he has misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he has complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious as the complaint in this case was. D

[24] In *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189 (FC), on the issue of ministerial discretion, Justice Raja Azlan Shah said at p 190/E-G; E

> This subjective formulation is sufficient to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. The exercise of this discretion is vested in the Minister, not in the courts. When this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal. F

[25] In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & other appeals* [1996] 1 MLJ 481; [1997] 1 CLJ 665, the Court of Appeal held as follows: G

> To summarise, *when a question arises as to whether the Minister has correctly exercised his discretion under s 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari*. H
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> ...
>
> It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s 20(1) of the Act and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. *His role is limited to ascertaining whether, on the facts and materials placed before him, the* I

representations raised serious questions of fact or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive. (Emphasis added.)

[26] In *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97, the Federal Court held as follows:

> There was much debate before us about the words 'meticulous examination of the facts'. In our view, there is no magic in the use of that phrase. It does not set any universal standard. It is not an inflexible term. *It merely means that there should be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person, similarly circumstanced, would have arrived at the decision which the Minister had done*. The extent of that duty had been succinctly stated by Abdoolcader SCJ in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; [1988] 1 CLJ 276 when he quoted, with approval a statement by Lord Denning HL in the case *Ashbridge Investment Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 at p 1326:
>
> > The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirements of the Act has not been complied with. Under this section, it seems to me that the court can interfere with the Minister's decision if he had acted on no evidence; of if he has come to a conclusion to which on the evidence he could not reasonably come; or he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account or vice versa; or has otherwise gone wrong in law. (Emphasis added.)

[27] The above principles have been reiterated by the Court of Appeal in *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612; [2021] 7 CLJ 371, where it was held that the discretion of the minister that is to be exercised according to law is in effect a legal obligation to refer a representation to the Industrial Court as long as he considers that there is a serious issue of fact or law which requires determination. This court also held it was not the function of the Minister under sub-s 20(3) of IRA 1967 to arrive at a concluded view upon the merits of the disputes. If the Minister is of the view that the complaint on the dismissal is not altogether frivolous and fanciful and that the dispute could not be amicably resolved, he would exercise his discretion and refer the dispute to the Industrial Court for adjudication. On the factual matrix of the case, this court held that where the workman's representation involves issue of sovereign immunity vis a vis the designation of the workman, this is a serious issue of fact and law to be adjudicated upon by the Industrial Court.

[28] Based on the aforesaid principles, the main issue before us is whether the Minister has correctly exercised his discretion under sub-s 20(3) of the IRA 1967 to refer the claimant's representation for adjudication in the Industrial Court.

Whether the Minister has correctly exercised his discretion under sub-s 20(3) of the IRA 1967

[29] In para 20 of his affidavit, the Minister said as follows:

> Berdasarkan kepada penyataan saya di perenggan 7 hingga 19 di atas, saya mendapati telah wujud persoalan undang-undang yang mana perkara ini perlu dirujuk kepada Mahkamah Perusahaan untuk diputuskan. Mahkamah Perusahaan merupakan medium terbaik untuk pertikaian diantara Responden Kedua dan Pemohon.

[30] The Minister's decision to refer the claimant's representation for adjudication in the Industrial Court is because the Minister finds that there are issues of law to be decided by the Industrial Court. The main legal issue to be decided by the Industrial Court is whether the claimant is a workman within the meaning of the IRA 1967.

[31] The respondent took the position that the claimant is not an employee as there is no contract of employment between the respondent and the claimant. Added to that, the respondent claimed that the claimant is a director of the company.

[32] The claimant however submitted that he was employed as a salaried director of the respondent. This can be seen from the financial statements of the respondent for the year 2013 (see exh JT4) where the details under 'employees information' included 'working directors'. The income tax form (EA Form) of the claimant for year 2013 also showed that the claimant had even paid EPF and contributed to SOSCO. Added to that, the Minister's affidavit also referred to differences between a working director and a non-working director, where the non-working director was given a consultant fee (see exh MKS2).

[33] Therefore based on the affidavits evidence, there is a dispute as to whether the claimant is a director or an employee of the respondent/company. Because of these disputes of facts and law, the Minister has correctly referred the claimant's representation to the Industrial Court.

[34] However, the respondent took the position that since the claimant was a director of the respondent, his removal as a company director at the extraordinary general meeting (EGM) was based on the respondent's articles of association read with s 206 of the Companies Act 2016. In essence, the respondent is asking the Minister to make a decision that the claimant is not a workman based on the affidavits when the matter should have been ventilated in the Industrial Court.

[35] The respondent further submitted that since the claimant was holding the position of a director for the respondent, he was the brain and directing mind of the respondent. This disqualified him from being a workman under the IRA 1967, based on the principle in *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687.

[36] However it must be noted that in both cases, it was the Industrial Court that decided on the issue as to whether the claimant there was a workman within the meaning of the IRA 1967. Therefore, reliance on these cases is clearly misplaced. In fact, in *Hoh Kiang Ngan*, the court looked at the manner in how the Industrial Court had to ascertain whether the claimant was or was not a workman, and it is not merely based on the affidavits of the Minister, the claimant and the company:

> We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail* [1990] 1 MLJ 365 at p 366; [1989] 3 MLRH 628, where he said:
>
> > I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was *concerned to get the truth of the claimant's duties and functions in the company*.
>
> In this case in order to determine whether the claimant was or was not a workman, the *Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company*. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company. (Emphasis added.)

[37] In any event, the Court of Appeal in *Menteri Sumber Manusia v John Hancock Life Insurance (M) Bhd* [2007] 2 MLJ 546; [2007] 1 CLJ 366 had already dealt with the same issue. In that case, the respondent/company applied for judicial review of the Minister's decision to refer the dispute under sub-s 20(3) of the IRA 1967 and sought to prohibit the Industrial Court from hearing the reference. The respondent contended that the claimant was not a 'workman' as he had been appointed the president/chief executive officer/director/managing director of the company. Therefore, his removal vide a resolution at the company's extraordinary general meeting did not amount to a 'dismissal'. As such, it was argued that the Minister acted without jurisdiction in referring the dispute to the Industrial Court and that the Industrial Court had no jurisdiction to adjudicate upon it. These arguments were rejected by the Court of Appeal where it was held that the issue of whether the claimant is a workman, being a question of mixed fact and law, is solely for the Industrial Court to decide:

> [35] *We would agree with learned counsel for the claimant that where there is an issue*

of workman involved, the only legal forum to deal with this issue is the Industrial Court. A certiorari is given only in cases where an error of law is disclosed. We cannot see any error of law disclosed in the Minister's decision to refer the claimant's representations to the Industrial Court. 'Judicial review is concerned, not with the decision, but with the decision-making process' and so say Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER; [1982] 1 WLR 1155 *at p 1173. The decision-making process adopted by the Minister was in accordance with s 20 of the Act, namely, upon receiving the notification of the Director General he exercised his discretion, after seeing it fit, to refer the claimant's representations to the Industrial Court for an award. We cannot find anything wrong with the Minister's decision in doing so. There are serious and fundamental disputes of fact and questions of law that arise from the claimant's representations and these are matters which have to be dealt with by the Industrial Court. The facts placed before the Minister were adequate for him to refer the claimant's representations to the Industrial Court. It is the Industrial Court which will have to decide whether the claimant is a workman as defined under the Act*. Once the Industrial Court determine the claimant was a workman, it has the jurisdiction. (Emphasis added.)

Whether the learned judicial commissioner had correctly applied the law

[38] In the present appeals, the learned judicial commissioner seemed to accept the principle that it is for the Industrial Court to decide if the claimant, as a salaried director, is a workman under the IRA 1967. This can be seen from the following findings in his judgment:

> [27] Mahkamah ini memutuskan berdasarkan keterangan R1 dalam afidavitnya seperti ditunjukkan di perenggan 25 di atas, *adalah jelas R1 telah membuat dapatan fakta serta telah membuat keputusan bahawa R2 merupakan pekerja pemohon dan adalah seorang pengarah bergaji di syarikat pemohon, sedangkan keputusan ini sewajarnya dibuat oleh Mahkamah Perusahaan*.
>
> [28] Keadaan seperti dinyatakan dalam dapatan mahkamah ini di atas mengakibatkan RI telah tersalah arah dan bertindak secara arbitrari dalam menjalankan kuasa yang diberikan kepadanya menurut sub-s 20(3) Akta 177.
>
> [29] Keputusan yang dibuat oleh R1 adalah jelas merupakan suatu keputusan yang tak sah di sisi undang-undang, tidak rasional dan cacat atas alasan ketakpatuhan dan ketakwajaran dari segi prosedur (illegal, irrational and flawed on the ground of procedural impropriety). (Emphasis added.)

[39] However, what is perplexing is that the learned judicial commissioner held that the Minister had committed an error in deciding that the claimant is a workman when the same should have been decided by the Industrial Court. If that is so, then the learned judicial commissioner should not have quashed the Minister's decision to refer the claimant's representation to the Industrial Court. If the learned judicial commissioner is of the view that under the law, it is for the Industrial Court to decide whether the claimant is a workman, then His Lordship should have dismissed the respondent's application to quash the Minister's reference.

[40] What is clear from the judgment is that the learned judicial commissioner has made a finding that the Minister has erred in his finding that the claimant is a workman, when the same should have been decided by the Industrial Court. However, the issue to be decided by the learned judicial commissioner is whether the Minister had committed an error of law when he decided to refer the claimant's representation to the Industrial Court. This has not been addressed by the learned judicial commissioner as he was more concerned as to whether the Minister had erred in his decision that the claimant is a workman.

[41] Added to that, the learned judicial commissioner seemed to have contradicted himself when he held that the Minister had decided that the claimant is a workman, and yet at the same time said that the Minister ought to refer the matter to the Industrial Court for decision. This is because the very act of referring the matter to the Industrial Court to decide can only mean that the Minister has not made any decision as to whether the claimant is a workman, as it is for the Industrial Court to adjudicate on that.

[42] In paras (31)–(32) of the judgment, the learned judicial commissioner made the following findings:

> [31] RI sepatutnya hanya menyatakan yang dia membuat keputusannya berdasarkan dokumen-dokumen di hadapannya, dan menyatakan dengan jelas bahawa beliau mengemukakan persoalan status R2 sebagai 'salary director' atau sebaliknya untuk diputuskan oleh Mahkamah Perusahaan.
>
> [32] Mahkamah ini memutuskan tatkala R1 membuat dapatan seperti dinyatakan dalam perenggan-perenggan dalam afidavitnya yang dinyatakan di atas, maka R1 telah menunjukkan suatu bentuk berat sebelah (*bias*) dalam mencapai keputusannya untuk merujuk kes kepada Mahkamah Perusahaan, kerana dia telahpun membuat suatu dapatan fakta.

[43] From the above findings, the learned judicial commissioner held that the Minister's decision to refer the claimant's representation to the Industrial Court is tainted with biasness as the Minister has already made a finding of fact that the claimant is a workman.

[44] However, upon perusing the Minister's affidavit, we find that the affidavits did not show that the Minister had made a decision that the claimant is a workman. The Minister's affidavits merely reveal the source of information and what sort of information he had relied on, in order for him to make a decision as to whether to refer or not refer the claimant's representation to the Industrial Court.

[45] In particular, the learned judicial commissioner has failed to consider para 20 of the Minister's affidavit, where the Minister has stated unequivocally

that since there are issues of law, the claimant's representation must be referred to the Industrial Court for adjudication. The Minister did not make any finding that the claimant is a workman within the ambit of the IRA 1967.

[46] Therefore, we are of the considered opinion that the learned judicial commissioner erred in his decision when he quashed the Minister's reference to the Industrial Court after making an erroneous finding that the Minister had made a decision that the claimant is a workman.

Whether Minister's failure to exhibit the notification under sub-s 20(2) is fatal

[47] The learned judicial commissioner has also made a finding that it is a statutory requirement for the notification made under s 20(2) of Industrial Relation Act to be in formal and/or written way and the failure of Minister to produce any proof in relation to this subsection shall render the referral fatal. His Lordship's finding is as follows:

> Selain itu, Mahkamah ini juga dapati kegagalan R1 menunjukkan bahawa kehendak statutori s 20(2) Akta 177 mengenai rujukan yang dibuat oleh Ketua Pengarah Perhubungan Perusahaan kepadanya adalah fatal kerana ini merupakan kehendak wajib statutori. Tiada juga sebarang penjelasan mengenai perkara ini dinyatakan dalam Afidavit R1.

[48] Both the claimant and the Minister took the position that this is not a pleaded issue raised in the judicial review application, in the statement or in the supporting affidavit. However, from the notes of proceedings, this issue was only raised by the judicial commissioner when he wanted to deliver his decision on 4 November 2019.

[49] We are also of the considered opinion that the learned judicial commissioner has committed an error of law when he decided on an issue that was not pleaded in the grounds of the application. Order 53 r 3(2) of the ROC 2012 provides that the grounds of the application must be stated in the statement and the statement may be amended to include new grounds under O 53 r 7. Order 53 rule 3(2) reads:

> (2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, *the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on*. (Emphasis added.)

[50] The issue of raising a ground not pleaded in the statement of the judicial review application was considered by the Federal Court in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, where Justice Chang Min Tat FJ (as he then was) held at p 309:

A There appears therefore to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the hospital. No point was however taken by counsel for Dr Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980, continue largely the same practice, O 53 B r 1(2) requiring such a statement, r 1A limiting the time for such an application, now, to six weeks of the order sought to be quashed and *r 3(1) providing that subject to the discretion of the court, no grounds shall be relied upon and no reliefs sought except those set out in the statement*. We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and because as C will be seen, *this amorphous application enabled the hospital to roam at large, well outside its proper confines*. (Emphasis added.)

[51] Justice Chang Min Tat added that the High Court should not have resorted to the affidavit for the grounds on which the application was brought, D as the rule was clear that all grounds had to be set out in the statement.

[52] In *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627, the Supreme Court held that the grounds and the affidavits must present a complete picture of the case of the applicant:

E Having said that, we would add that it is a counsel of prudence for a lawyer drafting his application under O 53 r 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application. He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the F documentary exhibits which are truly relevant and upon which he intends to rely. *The object of these steps in to ensure that the court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review*. (Emphasis added.)

G **[53]** Therefore, we find that the learned judicial commissioner has erred in law when he decided on an issue not pleaded by the parties. Added to that, he only raised the issue on the day when he delivered the decision, without affording the parties an opportunity to submit on the matter.

H **[54]** In any event, we find that this issue of the statutory notice was considered by the Federal Court in the case of *Minister of Labour and Manpower & Anor v Wix Corporation South East Asia Sdn Bhd* [1980] 2 MLJ 248; [1980] 1 MLRA 515, and the court held as follows:

I *In notifying the Minister, s 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement*. Further, in convening a meeting he has no power to compel the attendance of any party. See *Patterson*'s case above. If one party does not attend, he may take it that the party desires no settlement. Furthermore, a duty to act judicially in accordance with

natural justice arises only in the exercise of functions that are analytically judicial (see *Judicial Review of Administrative Action* by SA de Smith, 3rd Ed at p 161). *The Director-General or his representative under s 20(2) of the Act cannot be said to exercise any powers that are analytically judicial. He is merely required to make a notification of an existing fact*. (Emphasis added.)

[55] We are of the considered opinion that the notification under sub-s 20(2) of the IRA 1967 is merely administrative in nature, and the failure of the Minister to exhibit the same does not nullify his decision under sub-s 20(3).

CONCLUSION

[56] We are of the considered opinion that the Minister has duly exercised his discretion within the ambit of sub-s 20(3) of the IRA 1967. The only question to be considered by the Minister is whether the claimant's representation raises a serious issue of fact and/or law to be adjudicated by the Industrial Court. We find that the Minister has duly considered all the facts placed before him in arriving at his conclusion that the dispute must be referred to the Industrial Court for adjudication.

[57] Consequently, we find merits in both appeals as the learned judicial commissioner had erred in his decision to allow the judicial review application and to quash the Minister's decision to refer the dispute to the Industrial Court. We allow both appeals with costs and we set aside the decision of the learned judicial commissioner.

Appeals allowed and decision of the High Court set aside.

Reported by Ashok Kumar